United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1352

To be argued by
WILLIAM M. BRODSKY

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1352

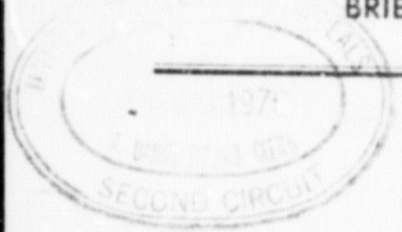
UNITED STATES OF AMERICA,
Appellee,

—*against*—

ROBERT E. TATE,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE



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Of Counsel.

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Preliminary Statement

Robert E. Tate appeals from a judgment entered by the United States District Court for the Eastern District of New York (Platt, *J.*) on May 28, 1976, convicting appellant of one count of willful failure to file a Federal income tax return for 1971, in violation of 26 U.S.C. § 7203. This appeal presents the issue of whether the District Court's sentence, which is well within the statutory maximum, is reviewable by this Court.

Statement of Facts

Appellant, an attorney, was charged in a five count information filed March 16, 1976, with willful failure to file personal income tax returns for the years 1969-1973, in violation of Section 7203 of the Internal Revenue Code

(26 U.S.C. § 7203). (A. 15a).[1] On March 31, 1976, after his motion to enter a plea of *nolo contendere* was denied by the District Court (A. 40a),[2] appellant pleaded guilty to count three of the information charging him with failure to file an income tax return for 1971—a year in which appellant had received a gross income of $60,926.09. (A. 41a-42a). On May 28, 1976 appellant was sentenced to one year in jail, execution of which was suspended; a $10,000 fine; and five years probation on the special conditions that he pay all his taxes, interest and penalties, and that he pay his fine by June 30, 1976.[3] This appeal followed.[4]

ARGUMENT

Appellant's sentence, which was well within the statutory maximum, is not reviewable by this Court.

Appellant's sole contention in this Court is that the sentence imposed by the District Court is excessive. He points only to the duration of his probationary period[5]

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[1] References denoted "A." are to appellant's appendix.

[2] Appellant's Notice of Motion and his attorney's Affidavit in support thereof appear at A. 30a-37a. The government's Memorandum in Opposition thereto is reproduced at A. 64a-69a.

[3] The maximum punishment to which appellant could have been sentenced is one year in jail and a $10,000 fine as well as the costs of prosecution. *See* 26 U.S.C. § 7203.

By order of this Court, entered July 22, 1976, the execution of appellant's fine has been stayed pending this appeal.

[4] Appellant's notice of appeal was filed June 11, 1976. (A. 2a).

[5] Appellant also refers to the District Court's requiring him to sign a $5,000 personal recognizance bond after he pleaded guilty (*See* A. 46a) as part of the "excessive sentence" from which he appeals. (Brief for Appellant p. 5).

Not only is the setting of post-conviction release conditions pursuant to 18 U.S.C. §§ 3148 and 3146 *not* part of any sentence,

[Footnote continued on following page]

as supporting his claim that his sentence "approaches . . . [the] . . . 'cruel and unusual[']" and is "erroneous and excessive and should be set aside". (Brief for Appellant, pp. 5-6).[6] We submit that appellant's claim is frivolous.

Although appellant concedes, as he must, that "the merits of a Federal sentence [are] unreviewable" (Brief for Appellant, p. 4),[7] he nevertheless attempts to deny the frivolity of his appeal by asserting that the District Court predicated its sentence upon "erroneous information" in the presentence report prepared by the Probation De-

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but it also fails to support appellant's contention that the District Court "was using [its] power to set bail for the purpose of exacting punishment and humiliation rather than to assure the appearance of the Appellant on the day of sentence". (Brief for Appellant p. 3).

Indeed, far from evincing a design to wreck "punishment and humiliation" upon appellant, the District Court, after accepting appellant's guilty plea, merely said:

> THE COURT: I think it would be probably adviseable [sic] to have [appellant] sign before a magistrate a $5,000 personal recognizance bond *and not require him to put up any security or anything of that nature, just sign for his appearance.*" (A. 46a) (emphasis supplied).

[6] Considering that the death penalty has recently been held *not* to be cruel and unusual, *Gregg* v. *Georgia*, ——U.S.——, 96 S.Ct. 2909, 2922-2932 (1976), we fail to see how a term of probation could "approach" the cruel and unusual.

[7] "It is frequently and correctly asserted that it is not the function of appellate courts to review sentences that are within statutory limits." *United States* v. *Mitchell*, 392 F.2d 214, 217 (2d Cir. 1968) (Kaufman, C.J. concurring). *See also Gore* v. *United States*, 357 U.S. 386, 393 (1958); *Blockburger* v. *United States*, 284 U.S. 299, 305 (1932); *United States* v. *Velasquez*, 482 F.2d 139, 142 (2d Cir. 1973).

Appellant has also acknowledged the law by not challenging the special conditions of probation. Both were well within the wide discretion of the District Court, one being specifically sanctioned by 18 U.S.C. § 3651. *Compare United States* v. *Pastore*, 537 F.2d 675 (2d Cir. 1976).

partment. Appellant claims that the District Court was influenced by the following alleged misstatements of fact in his presentence report:

(1) that appellant had taken no steps towards preparing or filing his returns until after his wife notified the Internal Revenue Service;

(2) that as of the date of his sentencing appellant still owed $7,473.80 in back taxes and $25,000 in penalties for 1968—a year for which prosecution for appellant's failure to file was barred by the statute of limitations (A. 65a); and

(3) the failure to state that appellant had retained an accountant to prepare his returns prior to the time the Internal Revenue Service became aware of his failure to file.

Appellant conveniently overlooks that the District Court had available to it at the time of sentencing appellant's own factual "correction" of the alleged misstatements, for appellant's counsel and his accountant submitted affidavits bringing these "errors" to the Court's attention.[8] Indeed, at the sentencing on May 28, 1976, Judge Platt commenced the proceedings by announcing that he had read appellant's affidavits "correcting" the presentence report. (A. 6a). He then conducted an inquiry of defense counsel and the Assistant United States Attorney which resulted in the accountant's original affidavit being read by the prosecutor and in his acknowledging that the affidavit differed in certain respects from the presentence report. (A. 6a-11a). Appellant's counsel then stated:

> I certainly accept that concession. (A. 11a).

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[8] These affidavits are reproduced at A. 48a-56a.

The Court then gave appellant's counsel a further opportunity to bring to its attention "anything further that you feel is improper in the presentence report" (A. 11a). Apparently satisfied with the status of the Court's understanding, appellant's counsel immediately launched into his allocution on behalf of appellant, noting:

> . . . I think the Probation Report has covered the impeccable character of the defendant, his home life, the tragedy of his family and the fact that he has a young boy who [sic] he takes care of without his wife's presence. . . . (A. 11a-12a).

Accordingly, we submit that the record demonstrates beyond peradventure that these alleged misstatements of fact were corrected before sentence was imposed. Moreover, "there is absolutely nothing in the record to show that [the District Judge] gave them any weight in arriving at his decision". *United States* v. *Mitchell*, *supra*, n.6, 392 F.2d at 216-217.

Appellant's cries of foul, made after indicating satisfaction with the facts available to the sentencing judge, must fall on deaf ears.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: September 29, 1976
Brooklyn, New York

Respectfully submitted,

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Of Counsel.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 29th day of September, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Peter J. Byrnes, Esq.
129 Third Street
Mineola, N.Y. 11501

Evelyn Cohen

Sworn to before me this
29th day of Sept. 1976

Carolyn N. Johnson

CAROLYN N. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-4618209
Qualified
Term expires March 30, 1977